BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the: Appeal from Board of Stewards Ruling #6, Pacific Racing Association, Dated April 5, 1998 JOHN MARTIN, Appellant.	Case No. SAC 98-029 OAH No. N 1998070295

PROPOSED DECISION

Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, heard this matter on December 7, 1999, in Oakland, California.

Mark D. Johnson, Deputy Attorney General, represented the California Horse Racing Board.

Appellant John Martin was represented by David M. Shell, Esq., 8788 Elk Grove Boulevard, Building 2, Suite F, Elk Grove, California 95624.

Submission of the matter was deferred pending receipt of briefs that had previously been submitted in this matter. Two briefs on appeal were received from the California Horse Racing Board, and they were marked as Exhibits I and II for identification. Appellant submitted a document entitled Respondent's Brief in Response to Court's Questions that was marked as Exhibit A for identification. The case was submitted for decision on December 10, 1999.

BACKGROUND

On January 31, 1998, February 1, 1998 and March 22, 1998, the Board of Stewards (Stewards) of the California Horse Racing Board (Board) conducted a hearing in response to a complaint filed against trainer John Martin (appellant). The complaint alleged violation of specified provisions of California Code of Regulations, Title 4, Division 4. (Rules.)

On April 5, 1998, the Stewards issued Ruling No. 6, providing as follows:

> "Owner/Trainer **JOHN F. MARTIN**, who started the horse **PAPA JOHN**, third place finisher in the seventh race at the California State Fair in Sacramento on August 31, 1997, is suspended one hundred and eighty (180) days (April 8, 1998 through October 4, 1998) pursuant to California Horse Racing Board rule #1887(a) (Trainer to Insure Condition of Horse) for violation of California Horse Racing Board rule #1843(a, b, d) (Medication, Drugs and Other Substances – Lidocaine).
>
> During the term of suspension, all licenses and license privileges of JOHN F. MARTIN are suspended and pursuant to California Horse Racing Board Rule #1528 (Jurisdiction of Stewards), he is denied access to all premises in this jurisdiction."

An appeal was timely filed from the Stewards' ruling and it was heard before Administrative Law Judge Ruth S. Astle on August 27, 1998. After hearing, Judge Astle remanded the matter to the Stewards so that the requirements of Government Code sections 11425.10 and 11425.50 might be satisfied. Her decision was adopted by the Board on December 4, 1998.

On April 28, 1999, the Stewards issued a "STATEMENT OF DECISION of the BOARD OF STEWARDS." It includes Findings of Facts, Conclusions and the original April 5, 1998 Order imposing a one hundred eighty (180) day suspension on appellant. It is from this Decision and Order (Ruling No. 6) that appellant brings this appeal.

The Stewards made the following Findings of Fact:

I

> John F. Martin trained the horse PAPA JOHN and entered the horse to run the seventh race on August 31, 1997 at Cal Expo State Fair.

II

> PAPA JOHN ran and finished third in the seventh race and a post race urine sample (#H9224) was taken in the official test barn.

III

The urine sample (#H9224) was sent to the official California Racing Board Laboratory (Truesdail Laboratories) and tested positive for the class II prohibited substance 3-hydroxy-lidocaine.

IV

John F. Martin was notified in a timely manner and given California Horse Racing Board Form 56 "Request to Release Evidence" and requested the split of urine sample (#H9224) be sent for analysis to Industrial Laboratories.

V

Industrial Laboratories confirmed the presence of 3-Hydroxylidocaine in the split urine sample #H9224.

VI

The owners (BERT BORGES, ANTHONY MELKONIAN and MARILYN MELKONIAN) were not notified of the positive test finding and were not given the opportunity to request a split sample testing of their own. However, California Horse Racing Board rule 1859.25 provides for one split sample to be available to the owner or trainer and John F. Martin's request satisfied the provisions of the law and rules and regulations.

VII

Simultaneous searches were conducted at John F. Martin's barns at Bay Meadows, Los Alamitos and Fairplex (Pomona) on September 18, 1997.

VIII

The searches conducted on September 18, 1997 were all negative for contraband relative to this case.

IX

Technical Director of Truesdail Laboratories NORMAN E. HESTER, testified to the procedure and validity of the finding of

the class II prohibited substance 3-hydroxylidocaine in urine sample #H9224.

X

Official Veterinarian JOAN HURLEY, D.V.M., testified to the security of the test barn and the procedure for obtaining, securing, labeling and shipping of samples to the official laboratory.

XI

John F. Martin's attending veterinarian, KENNETH C. ALLISON, D.V.M., testified he did not prescribe nor did he administer 3-hydroxylidocaine or any substance containing 3-hydroxylidocaine to the horse PAPA JOHN on, or prior to, August 31, 1997.

XII

John F. Martin testified he did not administer 3-hydroxylidocaine or any substance containing 3-hydroxylidocaine to the horse PAPA JOHN on, or prior to, August 31, 1997.

XIII

John F. Martin testified he has no knowledge of anyone else administering 3-hydroxylidocaine or any substance containing 3-hydroxylidocaine to the horse PAPA JOHN on, or prior to, August 31, 1997.

XIV

John F. Martin testified that he has had two prior class I medication violations, morphine 1988 (six months suspension) and etorphine 1985 (one year suspension) in California.

The Stewards concluded that appellant was the trainer of record of the horse PAPA JOHN who finished third in the seventh race at California State Fair in Sacramento, California on August 31, 1997. And that the horse subsequently tested positive for the class II prohibited substance 3-hydroxylidocaine in violation of Rule 1843(a), (b) and (d). The Stewards found that the presence of a prohibited substance in a post race test sample required the disqualification of the horse pursuant to Rule 1859.5 and the forfeiture of any purse monies earned in that race.

The Stewards also found that appellant, as trainer of the horse PAPA JOHN, was responsible for the care and condition of the horse pursuant to Rule 1887(a) and was therefore responsible for the violation of Rule 1843(a), (b) and (d). He was suspended one hundred eighty (180) days.

Appellant filed a timely appeal from the Stewards' ruling.

STANDARD OF REVIEW

Under Rule 1761, every decision of the Stewards, except a decision concerning disqualification of a horse, may be appealed to the Board. Under Business and Professions Code section 19517, the Board may overrule a Stewards' decision if a preponderance of the evidence shows the Stewards mistakenly interpreted the law, if new evidence of a convincing nature is produced, or if the best interests of racing and the state may be better served. On appeal the burden is on the appellant to prove the facts necessary to sustain the appeal. (Rule 1764.)

REVIEW

A. Failure to Adopt Penalty Regulations

Appellant contends that the Board may not impose any penalty in this case because it has failed to adopt penalty regulations as required by law. Specifically, appellant relies upon subsection (a) of Business and Professions Code section 19580 which states that:

> The board shall adopt regulations to establish policies, guidelines, and *penalties* relating to equine medication in order to preserve and enhance the integrity of horseracing in the state.

(Emphasis added.)

Additionally, subsection (a) of Business and Professions Code section 19582 provides that violations of section 19581 "are punishable as set forth in regulations adopted by the board." He further notes that Article 6 of the Administrative Adjudication Bill of Rights, subsection (e) of Government Code section 11425.50 provides:

> A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).

In fact, the Board did submit proposed regulation 1843.3 governing disciplinary action for medication violations, but it was rejected by the Office of Administrative Law. From 1991, the time that the California Legislature rewrote the equine medication law (Article 8.5 of the Bus. & Prof. Code, §§ 19580 – 19583), to present the Board has not adopted regulations governing imposition of penalties relating to equine medication. By continuing to rely upon a proposed regulation (Rule 1843.3) appellant argues that the Board's penalty is based upon an underground regulation and that its decision must therefore be overturned.

The idea behind adopting regulations to formalize penalty guidelines is to provide notice to potential offenders of consequences for disobeying the law/regulations. If a penalty is based on an "underground rule" – one not adopted as a regulation as required by the rulemaking provisions of the Administrative Procedure Act – a reviewing court should exercise discretion in deciding the appropriate remedy. Generally the court should remand to the agency to set a new penalty without reliance on the underground rule but without setting aside the balance of the decision. Remand would not be appropriate in the event that the penalty is, in light of the evidence, the only reasonable application of duly adopted law. Or a court might decide the appropriate penalty itself without giving the normal deference to agency discretionary judgments. (See Cal. Law Revision Com., Gov. Code, § 11425.50(e); *Armistead* v. *State Personnel Board* (1978) 22 Cal.3d 198.)

Here the agency made at least one attempt to have its penalty guidelines (Rule 1843.3) adopted as regulations. For whatever reason the process has stalled. It needs to get back on track, and soon, what with eight years having passed since Business and Professions Code section 19580 went into effect. Yet the Stewards retain discretion to impose a penalty, particularly if rigid adherence to an "underground rule" is not apparent and if the decision itself sets forth a reasonable basis for the penalty imposed. That is the case here.

In Finding XIV, the Stewards note that appellant had two previous Class I level violations. These prior violations resulted in two suspensions, one for one year and the other for six months. The instant case involves a Class II level violation. The Legislature has by statute specified the penalty for a third lifetime equine medication violation. Subsection (b) of Business and Professions Code section 19582 provides that "[a] third violation of Section 19581 during the lifetime of the licensee, determined by the board to be at a class I or class II level, shall result in the permanent revocation of the person's license." In this case the Stewards imposed a suspension for 180 days. This is a relatively light penalty given the statutory imperative that a third violation *shall result*

in the permanent revocation of the license. Under the circumstances appellant can hardly complain that the penalty imposed by the Stewards is unreasonable.[1]

Although the Board has failed to adopt penalty regulations as required under section 19580 of the Business and Professions Code, it is apparent that the penalty imposed by the Stewards is neither unreasonable nor is it one that was arrived at by the Steward's adherence to Board penalty guidelines. Appellant's argument that the Board has no authority to impose any penalty prior to its adoption of regulations is not persuasive. Such an interpretation of section 19580 would essentially strip the Board of powers necessary and proper to enable it to carry out fully its responsibilities to protect the public. (See Bus. & Prof. Code, §§ 19440, 19401.) The Legislature could not have intended such result.

B. Validity of Board Regulations

Appellant also contends that the regulations that were adopted by the Board go well beyond what the Legislature authorized. He argues that they do not take into account the time of administration of drugs as provided by the governing statute, Business and Professions Code section 19581. This section provides in part:

> No substance of any kind shall be administered by any means to a horse after it has been entered to race in a horserace, unless the board has, by regulation, specifically authorized the use of the substance and the quantity and composition thereof.

Under Rule 1843.5 a horse is deemed to be "entered" in a race 48 hours before post time of the running of such race. Appellant's concern is that under Rule 1843, a finding that a test sample taken from a horse contains a drug substance is considered prima facie evidence that the responsible trainer has been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse.[2] Such, he argues, fails to take into account the actual time of administration of the drug, making

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[1] Even under proposed Rule 1843.3, a six month suspension is considered the minimum period of suspension for a first offense involving a Class II level violation. A third offense (lifetime) for a Class I or II level violation under this rule would result in "[s]uspension and referral to the Board for revocation of license." The Stewards certainly did not adhere to these "underground regulations" for a third lifetime Class I or II offense.

[2] Rule 1843(d) provides: "A finding by an official chemist that a test sample taken from a horse contains a drug substance or its metabolites or analogues which has not been approved by the Board, or a finding of more than one approved non-steroidal, anti-inflammatory drug substance or a finding of a drug substance in excess of the limits established by the Board for its use shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse."

language in Business and Professions Code section 19581 relating to drug administration irrelevant.

Although a laboratory finding may be accepted as prima facie evidence of drug administration, any presumption of negligence in the care of the horse or in the administering of a drug substance that arises from Rule 1843 is not conclusive. It is subject to challenge and appellant could certainly have offered evidence relevant to the time of drug administration at the Stewards hearing. In this case both appellant and the attending veterinarian testified to having no knowledge of the drug substance being administered to the horse. Appellant was unaware of any other person who may have administered the drug and searches of his barns were negative for the drug substance. The Stewards included these findings in their decision. Appellant also had the opportunity to offer new evidence of a convincing nature on appeal before the Board. Thus, Rule 1843 did not preclude appellant from offering evidence relevant to the issue of time of administration of a drug substance.

The Stewards clearly have discretion in determining what penalty to impose upon a trainer after a finding of a prohibited drug substance.[3] Imposition of fines, suspensions or revocation is discretionary, not mandatory. It would therefore follow that the time of administration of a drug substance, if known, would be a relevant factor in determining the culpability of a trainer or others. It would also be considered in determining what discipline, if any, should be imposed in a given case.

When viewed in context of appellant being given an opportunity to offer evidence on time of administration, the presumption created by Rule 1843 is not unreasonable. A test sample found to be positive for a prohibited drug substance is prima facie evidence that the drug substance has been administered to the horse. But any presumption of negligence in the care of the horse or in the administration of the drug substance is not conclusive, and it is subject to challenge at hearing or on appeal.

Finally, even if it were determined that Rule 1843 conflicted with Business and Professions Code section 19581, the validity of these laws and regulations cannot properly be challenged at administrative hearing absent authority for such review in a statute or regulation. (*Tidewater Marine Western, Inc.* v. *Bradshaw* (1996) 14 Cal.4th 557; *Smith* v. *Vallejo General Hospital* (1985) 170 Cal.App.3d 450.)

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[3] Thus, Rule 1887 provides in relevant part: "Should the chemical or other analysis of urine or blood test samples or other tests, prove positive showing the presence of any prohibited drug substance as defined in Rule 1843.1, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off; and, in addition, the owner of the horse, the foreman in charge of the horse, the groom, and any other person shown to have had the care or attendance of the horse may be fined, his/her license suspended, revoked, or be ruled off."

C. Sufficiency of the Evidence

The Standard of Review

As this is an appeal pursuant to Rule 1761 from a Stewards' decision following an evidentiary hearing, the standard of review to be applied concerning evidence is the substantial evidence test. This review is analogous to the review engaged in by the superior court when reviewing an administrative agency's decision under Code of Civil Procedure section 1094.5, subdivision (c). (*Powers* v. *City of Richmond* (1995) 10 Cal.4th 85, 93; *Jones* v. *Superior Court* (1981) 114 Cal.App.3d 725.) Under the substantial evidence test the evidence is not reweighed, nor may the reviewing court substitute its findings or inferences for those of the agency. It is for the agency to determine the weight to be given to conflicting evidence. (*Sierra Club* v. *California Coastal Com.* (1993) 12 Cal.App.4th 602, 610.)

A further review is to be made into whether the findings made by the Stewards support the decision. (*Topanga Assoc. for a Scenic Comm.* v. *County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.) Thus, a court may reverse an agency's decision if, based on the evidence before the agency, a reasonable person could not reach the same conclusion reached by the agency. (*McMillan* v. *American Gen. Fin. Corp.* (1976) 60 Cal.App.3d 175, 186.)

Review

Appellant contends that critical documentary evidence was not adequately authenticated, and that the record does not contain evidence sufficient to support the chain of custody of the sample from the track to the laboratory. Thus he challenges Findings II, III and V relating to the taking of a urine sample from PAPA JOHN in the official test barn, transportation of that same sample to Truesdail Laboratories and then the positive laboratory test for 3-Hydroxylidocaine.

Test Barn. Appellant points out that Exhibit 19, Acknowledgement of Test Sample, was not admitted into evidence. This is the form used to acknowledge a witness' presence at the taking of a urine and blood sample from a particular horse. Yet there is substantial evidence in the record to establish that urine/blood samples were taken from PAPA JOHN. Appellant testified that after the race the horse's groom, Victor Robledo, accompanied the horse to the test barn for the samples to be drawn. The State Veterinarian, Joan Hurley, described the procedures followed in the testing barn. It is a secure area with guards posted at the gate who check the licenses of all individuals who enter. Water buckets are emptied and rinsed between horses and testers change gloves between each horse. After collecting the sample, the tester divides it with a second jar for the split sample. The split sample is preserved and made available for testing at the request of the trainer or owner in the event of a positive test of the primary

sample. The tester then seals both jars in front of the groom using signed, tamperproof seals, and then turns them over to the custodian of samples or evidence clerk.

Importantly, it is the evidence clerk's job to receive the sealed samples from the urine collector and to check the acknowledgement of test sample form for accuracy before putting the blood samples in the refrigerator and urine in the freezer. The parties stipulated that the declaration of the evidence clerk, Laura Gilson, be received in evidence as Exhibit 2. Ms. Gilson personally checked the acknowledgement of test sample form for accuracy as to the horse's name, and also checked the samples to make sure that they were sealed and properly filled out. She did so before placing the samples in a locked refrigerator and freezer. She personally packed the samples for shipment to the Truesdail testing laboratory. The shipping coolers were locked and sealed. A daily shipping log tracks the individual coolers and an Airborne delivery driver signs for each cooler.

Although Exhibit 19, Acknowledgement of Test Sample, was not admitted into evidence, substantial evidence supports the Stewards' finding that urine sample (#H9224) was taken in the official test barn from PAPA JOHN, and that it was properly secured and sent to Truesdail Laboratories.

Truesdail Laboratory. Appellant further contends that laboratory documents admitted on the basis of testimony of the laboratory's director, Norman Hester, Ph.D., are inadmissible as hearsay. As technical director of the laboratory, Dr. Hester testified generally to the Truesdail laboratory procedures for receiving, logging and testing of samples received by the laboratory. He did not personally conduct the laboratory tests on the samples drawn from PAPA JOHN, and appellant argues that without such personal knowledge of the particular testing done in this case, he cannot properly testify to the time or mode of preparation of laboratory documents/findings relating to PAPA JOHN.

The Truesdail laboratory reports were properly admitted as business records under Evidence Code section 1271, which states:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
> (a) The writing was made in the regular course of a business;
> (b) The writing was made at or near the time of the act, condition or event;
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Dr. Hester testified that the report was made in the regular course of Truesdail Laboratory's business as a testing laboratory, that the document was prepared after the test results had been obtained and reviewed and he testified as to its identity and mode of preparation as well as the sources upon which it was based.

Dr. Hester testified that the sample was tested first by immunoassay, then gas chromatography/mass spectroscopy. This test showed the sample was found to contain 3-hydroxylidocaine, the most common metabolite of lidocaine found in equine samples. Dr. Hester personally reviewed the test results. He was qualified to testify as to the laboratory results of the PAPA JOHN urine analysis contained in the data packet. As technical director of Truesdail Laboratory, and as one who personally reviewed the test results in this case, Dr. Hester properly served as an "other qualified witness" who could testify to the identity of the Truesdail Laboratory documents and their mode of preparation within the meaning of Evidence Code section 1271.

There was no requirement that other employees of Truesdail Laboratory be brought in to testify as to their involvement in conducting every single laboratory test. (*People* v. *Crosslin* (1967) 251 Cal.App.2d 968.) The California Supreme Court recently noted that Evidence Code section 1271 does not require that the person who prepared the business record testify regarding its contents, and that where the contents of a business record carry sufficient indicia of reliability, the confrontation clause is satisfied and the record may be admitted under this "firmly rooted" exception to the hearsay rule. (*People* v. *Beeler* (1995) 9 Cal.4th 953, 979.)

As to appellant's objection over the lack of other Truesdail Laboratory witnesses to testify to the chain of custody of the sample at the laboratory, the record contains substantial evidence that the sample from PAPA JOHN was coded, sealed, shipped and received under secure conditions with clear identifying information. Dr. Hester testified that had the sample arrived in a damaged or unsealed condition, he would have received a report of the problem. He received no such report. Under Evidence Code section 1272, the absence of a record may be offered to prove the non-occurrence of any event, where it was the regular course of business to make records of such events.[4] In this case the absence of any report of problems, and verification in the business record that all samples in the shipment had been found intact, constitutes substantial evidence in support of the Stewards' finding that urine sample (#H9224) which tested positive for 3-hydroxylidocaine was taken from PAPA JOHN.

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[4] Evidence Code section 1272 provides: "Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if:

(a) It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them; and

(b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist."

Industrial Laboratories Report. Appellant also challenges Finding V wherein the Stewards merely note that "Industrial Laboratories confirmed the presence of 3-Hydroxylidocaine in the split urine sample #H9224." The Stewards were entitled to consider the letter from Industrial Laboratories (Exhibit 27) as hearsay evidence "used for the purpose of supplementing or explaining other evidence." (Gov. Code, § 11513(d).) However, it could not be admitted as a business record under Evidence Code section 1271 on the basis of it being generated as a result of a request made to a CHRB approved laboratory. Absent an adequate foundation being laid in this case, the Industrial Laboratory report is not sufficient in itself to support a finding of 3-hydroxylidocaine in the split urine sample.

Quantification of Sample. Appellant contends that the split sample should have been quantified, and that the failure to quantify the split sample renders invalid the laboratory findings. The primary testing lab will perform quantification for certain drugs for which the Board has established a threshold, or allowable amount. As a completely prohibited drug, there is no allowable amount for lidocaine and therefore the Board does not require quantification for this drug. Appellant requested quantification but was refused. He argues that had his request been granted, he may have been able to trace the origin of the drug. The refusal to allow quantification in this case was not prejudicial to appellant. Both appellant and the veterinarian assigned to PAPA JOHN had no possible innocent explanation for even very small amounts of lidocaine. It is unclear how quantification might have further jogged their memories or otherwise produced mitigating or exculpatory evidence relating to the time/manner of administration of the drug.

The Order. Appellant challenges the order itself as not being supported by the findings. In particular, he contends that there must be a finding that the horse had been administered a drug after it had entered the race. For reasons already discussed, such a finding is not necessary. Further, under Rule 1887 appellant, as trainer, is ultimately responsible for the condition of horses entered in a race. Rule 1887 states:

> (a) The trainer shall be the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties, except as otherwise provided in this article. Should the chemical or other analysis of urine or blood test samples or other tests, prove positive showing the presence of any prohibited drug substance as defined in Rule 1843.1, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off; and, in addition, the owner of the horse, the foreman in charge of the horse, the groom, and any other person shown to have had care or attendance of the horse may be fined, his/her license suspended, revoked, or be ruled off.

LEGAL CONCLUSIONS

A review of the entire record before the Board of Stewards does not find any error of law requiring reversal. The review does reveal that substantial evidence supports the Stewards' findings, and that those findings support the determination that cause for discipline exists for violation of Rule 1843, subdivisions (a), (b) and (d), and Rule 1887, subdivision (a). The penalty imposed was proper.

ORDER

The Board of Stewards' Ruling #6, Pacific Racing Association, dated April 5, 1998, against owner/trainer John F. Martin, is affirmed.

DATED: February 11, 2000

JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings